

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 16, 2004 Session

GARY KENT GILLUM, SR., v. LAUREN DAVIS GILLUM McDONALD

**Appeal from the Circuit Court for Davidson County
No. 96D-3005 Muriel Robinson, Judge**

No. M2003-00265-COA-R3-CV - Filed September 2, 2004

Under Marital Dissolution Agreement Mother and Father “temporarily agreed” to alternate physical custody of child on a week-to-week basis. Five months later Mother filed a petition for change of custody. The trial court awarded physical custody to Mother during the school year and to Father during the summer. Father appeals arguing that the trial court erred (1) by excluding evidence of Mother’s conduct before the divorce and (2) by failing to state the reasons and facts on which it based the custody award. We reverse and remand, finding that the trial court erred by excluding evidence of conduct prior to the divorce and by not stating the reasons and facts on which it based its custody decision as required by Tenn. Code Ann. §36-6-101(a)(2)(B)(I).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Tim T. Ishii, Nashville, Tennessee, for the appellant, Gary Kent Gillum, Sr.

Robert T. Jackson, Gary D. Copas,¹ Nashville, Tennessee and Bryce C. Ruth, Jr., White House, Tennessee, for the appellee, Lauren Davis Gillum McDonald.

OPINION

Mother and Father were granted a divorce on November 18, 1997. Pursuant to the Marital Dissolution Agreement (MDA) Mother and Father entered into a temporary agreement to share joint legal custody of their only child with Mother being the primary custodial parent and the parents alternating physical custody on a weekly basis. The MDA expressly provided that the custody arrangement was temporary – six months. The pertinent part reads:

¹Mr. Copas is not counsel of record but he presented the oral argument due to scheduling conflicts.

The parties further agree that this is a temporary custody arrangement that the parties desire to attempt to work over the next six (6) months. In the event either party deems that this custody arrangement is not working in the best interest and welfare of the minor child, then the custody and possession arrangement shall be set to be heard before the Court for modification.

Five months later, April of 1998, Mother filed a petition to modify custody. She alleged that the custody agreement was not workable and not in the child's best interests, that the child was being exposed to inappropriate adult situations and was exposed to cigarette smoke when he was with Father, and that the child was returned so late in the mornings that the child was late for school, causing school officials to complain. Father filed an answer and counter-petition for custody. He agreed that the custody arrangement was not working.

The trial court advised the parties that since there had not been a contested custody hearing, neither party was required to show a material change in circumstances and the court would base its decision on the best interests of the child as in any initial custody proceeding.² The trial court also advised the parties that it would not consider any evidence of conduct prior to the divorce because they had agreed to joint custody at the time of the divorce. Specifically the court stated, "It's a comparative fitness from that point on, because there weren't any issues then. If any acts, that one of them did, was not an issue at the time they signed this agreement. So, acts since then."

Following an evidentiary hearing, the trial court found that the "week to week" custody arrangement was not workable and awarded physical custody to Mother during the school year and to Father during the summer. The court also required that the child attend school in Shelbyville, Tennessee, where Mother resided.

After the hearing was concluded, but before the order was entered changing custody, Father filed a motion to alter or amend or alternatively for a new trial. Father asserted that the court erred in limiting the proof that he was allowed to introduce and if he had been allowed to introduce other evidence, the court would have seen that he is the more fit parent under the comparative fitness standard. The trial court denied Father's motion and Father appealed.

Standard of Review

An appellate court's review of a trial court's findings of fact in a child custody case is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *Hass v. Knighton*, 676 S.W. 2d 554, 555 (Tenn.1984); *Bah v. Bah*, 668 S.W. 2d 663, 665 (Tenn. Ct. App. 1983); Tenn. R. App. P.13(d). This court will not disturb a child custody decision unless it is based on a material error of law or the evidence preponderates against it. *Adelsperger v. Adelsperger*, 970 S.W. 2d 482, 485 (Tenn.

²There had not been a previous contested hearing over custody because the parties initially entered into an agreed MDA providing for custody, albeit temporary.

Ct. App. 1997). In matters of divorce and child custody, trial courts are vested with broad discretion, and appellate courts will not interfere except upon a showing of erroneous exercise of that discretion. *Hoalcraft v. Smithson*, 19 S.W. 3d 822, 827 (Tenn. Ct. App. 1999). A trial court's conclusions of law are not accompanied by a presumption of correctness. *Placencia v. Placencia*, 48 S.W. 3d 732, 734 (Tenn. Ct. App. 2000).

In deciding custody matters, trial courts take into account a number of factors, including the parents' demeanor and credibility during the divorce proceedings themselves, and, accordingly, an appellate court is reluctant to second-guess a trial court's decisions regarding child custody. *Nelson v. Nelson*, 66 S.W. 3d 896, 901 (Tenn. Ct. App. 2001). Even though trial courts have broad discretion in these matters, the applicable principles of law must still be applied. *Gaskill v. Gaskill*, 936 S.W. 2d 626, 631 (Tenn. Ct. App. 1996). When the resolution of the issues in a custody case depends on the truthfulness of the witnesses, the trial judge has the opportunity to observe the witnesses and their demeanor while testifying and is thus in a far better position than this court to decide those issues. *Lee v. Lee*, 66 S.W. 3d 837, 851 (Tenn. Ct. App. 2001). Great weight must be given to the factual determinations made by the trial court who both heard and observed the witnesses. *Solima v. Solima*, 7 S.W. 3d 30, 32 (Tenn. Ct. App. 1998).

Comparative Fitness Criteria

In any proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. Tenn Code Ann. § 36-6-106(a). The court shall consider all relevant factors including the following where applicable:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; . . .;
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
- (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; . . . ;
- (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and

- (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn Code Ann. § 36-6-106(a).

In deciding custody, the child's best interest is the "paramount consideration." "It [best interest] is the polestar, the *alpha and omega*." *Bah v. Bah*, 668 S.W. 2d 663, 665 (Tenn. Ct. App. 1983). The "comparative fitness" analysis is used to determine which custodian is more fit than the other for the purpose of having custody. *Id.* at 666. Our courts recognize that there are "literally thousands of things that must be taken into consideration in the lives of young children." *Id.* at 666. In making this analysis, the trial court "should not focus only on one parent's fitness since both parents' fitness should be compared and considered." *Nelson v. Nelson*, 66 S.W. 3d 896, 901 (Tenn. Ct. App. 2001) (citing *Gaskill v. Gaskill*, 936 S.W. 2d 626, 631 (Tenn. Ct. App. 1996)). As stated in *Bah*:

This is and must remain the true test for the award of custody. To arrive at the point of deciding with whom to place a child in preparation for a caring and productive adult life requires consideration of many relevant factors, including but certainly not limited to the age, habits, mental and emotional make-up of the child and those parties competing for custody; the education and experience of those seeking to raise the child; their character and propensities as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative; and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture.

Bah at 666.

Determining the most appropriate custody arrangement is not dominated by "hard and fast rules." *Gaskill*, 936 S.W.2d at 630. Such a determination is factually driven and requires the court to carefully weigh numerous considerations. *Id.* at 630. Subtle factors may also be determinative, including the demeanor and credibility exhibited by the parents during the divorce proceeding. *Id.* at 631. Thus, trial courts are granted broad discretion with respect to custody determinations, and "appellate courts are reluctant to second-guess" the trial court's decisions in this regard. *Id.* at 631. Even so, the trial court must still base its decisions on the proof and properly apply the appropriate principles of law. *Id.* at 631 (citing *D v. K*, 917 S.W. 2d 682, 685 (Tenn. Ct. App. 1995)).

Exclusion of Evidence Prior to Divorce

Father asserts that he was denied a fair hearing because the trial court peremptorily refused to hear evidence of any conduct prior to the divorce, which occurred five months prior to the filing of the petition to modify custody. Father specifically complains of the exclusion of evidence that Mother “shot at” a paramour while the child was present. He insists that this incident bears heavily on Mother’s fitness as the physical custodian. He argues that exclusion of such evidence was error because the custody decision was to be based on the comparative fitness of the parties and the court had not previously compared the fitness of these parents, thus their conduct prior to the divorce, a mere five months earlier, was still relevant.

Mother argues that the exclusion of this evidence rests with Father, not the trial court, because Father failed to make an offer of proof. Admitting that he did not make an offer of proof, which is normally required, Father insists he is excused from making an offer of proof based on two exceptions in Rule 103, Tenn. R. Evid. The exceptions are: (1) when the substance of the evidence and the specific evidentiary basis supporting admission is apparent from the context of the questions and (2) when exclusion of the evidence seriously affects the fairness of the trial.

The trial court stated unequivocally that evidence prior to the divorce would not be considered. During Mother’s testimony, when the alleged shooting incident was raised, this exchange occurred:

Q	And in fact, you shot a gun at Sebastian [paramour], didn’t you, while [Child] was in the house?
A	This is before the divorce.
Q	But you did it, didn’t you?
A	It’s before the divorce.
Mr. Ruth:	Objection.
Court:	Well, at the time that you all entered into this arrangement, your client knew that, didn’t he?
Ms. Bohn	I don’t know if he knew all the facts or not, Your Honor. I’m sorry.
Court:	It’s history.

Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and in case the ruling is one excluding evidence, “the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context within which the questions were asked.” Tenn. R. Evid. 103(a). Addressing the purpose of an offer of proof and those situations when an offer of proof is not required, *Tennessee Law of Evidence* explains that:

When an objection is made, sustained, and evidence is excluded, both trial and appellate courts often have a difficult time reviewing the decision unless the excluded evidence is somehow included in the record. For example, a trial judge

who has excluded a piece of evidence may be unable to reassess the decision unless somehow the content of the evidence is disclosed. Likewise, an appellate court may be unable to assess whether a “substantial right” was affected by an error unless the court knows the substance of the excluded evidence and can view it in the context of the entire trial. Tennessee appellate courts routinely refuse to consider allegations of erroneous exclusion of evidence if there was no offer of proof.

....

According to Rule 103(a)(2), an offer of proof is not needed when the substance of the evidence and the reasons for admission “were apparent from the context within which questions were asked.” This could occur when the witness’s previous responses, the wording of the question, and other evidence in the case reveal the substance of the excluded testimony.

Neil P. Cohen et al., *Tennessee Law of Evidence* § 1.03[5][a] and [c].

Father should have made an offer of proof; however, the failure to do so is not fatal because the substance of the excluded evidence is apparent from the context of the questions. Thus, it is not necessary to examine whether the trial court’s exclusion of the evidence constitutes plain error, as asserted by Father. We must, however, determine whether a substantial right was affected by the exclusion of the evidence. Tenn. R. Evid. 103 (a). The term “substantial right” is not defined in the rules and we find little guidance elsewhere.³ Some authorities ask whether it was “more probable than not” or whether there was a “reasonable likelihood” that a substantial right was affected. *Tennessee Law of Evidence*, 1.03[3][b].

To determine whether it was more probable than not that a substantial right was affected we must consider all the relevant proof in order to determine the impact of the disputed evidence. Here, the parties were married five years and the child was three and one-half years old at the time of the divorce. Mother filed the petition to modify custody a mere five months later. The trial court did not conduct a comparative fitness analysis at the time of the divorce because the parties agreed to a joint custody arrangement, albeit temporary. At the hearing on the petition to modify custody, the trial court limited the evidence to a post-divorce period even though this was the first and only comparative fitness hearing. Limiting the evidence to post-divorce conduct was a significant limitation relative to the age of the child and the time that expired since the divorce.⁴ Thus, the trial court refused to consider a significant and relevant period. Limiting the evidence to post-divorce conduct substantially impaired the trial court’s ability to make an informed custody decision based

³“There is little discussion, no agreement, and virtually no precision in judicial efforts to describe how convinced the appellate court must be that the error affected the jury’s decision.” *Tennessee Law of Evidence*, 1.03[3][b].

⁴Though the petition was filed five months after the divorce, April 1998, the hearing was not held until October 2002. The delay expanded the period the court examined; nevertheless, it was error to exclude all conduct prior to the divorce because the court had not previously examined the comparative fitness of the parents.

on the best interest of the child and the comparative fitness of the parents. The only basis given for excluding such a significant and relevant period was that the parties had agreed to a joint custody arrangement and therefore found each other suitable as a custodial parent. We believe the trial court exceeded its discretion by excluding pre-divorce evidence because the period of time and conduct was significant and relevant and excluding such evidence more probably than not affected the substantial rights of the parties and the child, whose best interest is at the heart of the inquiry.

Accordingly, we remand the matter so that the parties may present relevant evidence pertaining to their comparative fitness during the three and one-half years prior to the divorce.

Basis for Custody Decision

Father also argues that the court erred because it did not state the reasons and facts supporting its custody decision in either its ruling from the bench or in its order as required by Tenn. Code Ann. § 36-6-101(a)(2)(B)(I). The statute provides, “In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.”

Here, neither the court’s order nor the ruling from the bench contains the reasons or facts that constitute the basis for finding Mother more fit, comparatively, than Father. Mother asserts that there are 21 findings by the court in the record that justify the basis for the custody; however, the findings Mother identifies are not the type of reasons or facts contemplated by Tenn. Code Ann. § 36-6-101(a)(2)(B)(I). The reasons and facts identified by Mother are deficient for purposes of a comparative fitness analysis because they do not compare one parent against the other. *Gaskill*, 936 S.W.2d at 631. They do not form a basis for the custody determination because they do not make a comparison between Mother and Father as to which is more fit to have custody.⁵ *Id.* at 631. The so-

⁵The “findings” Mother proclaims to be relevant are as follows:

1. “This case was relatively simple.”
2. Statements regarding the role of a step-parent.
3. The parents have done a “terrible job” of communicating.
4. The parents cannot work together without supervision.
5. Court’s discussion that the week-to-week custody arrangement was a bad idea from the beginning.
6. Court does not usually approve week-to-week custody arrangements because these arrangements do not work.
7. Petition to change custody has been lingering too long and should have been resolved sooner.
8. Parents need to reassess their conduct and act appropriately in the future.
9. The week-to-week plan is not workable.
10. “[B]oth of you all are fit parents, you’re good parents. You’re just not nice to each other.”
11. Both parents enjoined from making derogatory comments about each other.
12. Court does not know how child does as well as he does given the parents “antics” and bitterness.
13. Both parents directed to treat each other with respect.
14. Court has not heard anything bad about the new spouses except for Father’s wife’s D.U.I.
15. MDA concerning “placement” of child is not workable and will be set aside.
16. Because of past problems, Court is going to “institute a bifurcated custody arrangement.”
17. “The best interest of this child, the Court finds, is that during the school year, custody will be vested with the mother. The child will reside in Shelbyville.”
18. Father will have custody during “June, July, and August.”

(continued...)

called findings provides no guidance concerning which parent is comparatively better to have physical custody of the child. Accordingly, we find that the trial court did not state its reasons and facts on which it based the custody determination.

When the trial court does not make specific findings of fact, the reviewing court may review the record *de novo* to determine where the preponderance of the evidence lies. *Department of Children's Services v. Owens*, 129 S.W. 3d 50, 54 (Tenn. 2004); *see also Lee v. Lee*, 66 S.W. 3d 837, 843 (Tenn. Ct. App. 2001). In the absence of findings of fact there is nothing, "to which we may attach the presumption of correctness." *Id.* at 843.

Though we may review the record *de novo* to determine where the preponderance of the evidence lies relative to the evidence that was admitted, this case cannot be resolved by such a review because evidence that more probably than not affected the substantial rights of the parties and the child was excluded.

The trial court correctly announced that it would base its custody decision on the "comparative fitness" of the parties. This standard is customarily used to "devise initial custody and visitation arrangements." *Gaskill*, 936 S.W.2d at 630. Here, the trial court had not conducted a previous or initial custody hearing. Thus, testimony should not be limited to matters that occurred after the parties' divorce when the trial court had not made a previous determination of the comparative fitness of the parents. Fitness for custodial responsibilities is largely a comparative matter. *Edwards v. Edwards*, 501 S.W.2d 283, 290 (Tenn.App.1973). Therefore, the courts must determine which of two or more available custodians is more or less fit than others. *Id.* at 291. Accordingly, we remand the matter to the trial for further proceedings consistent with this opinion.

Attorney Fees

____ Mother argues that she should be awarded her attorney fees and costs on appeal. In that Father has prevailed on appeal, it is inappropriate to award attorney fees to Mother.

Costs of appeal are assessed against the parties equally.

FRANK G. CLEMENT, JR., JUDGE

⁵ (...continued)

19. Court made specific findings regarding visitation.

20. Both parents "enjoined and restrained from being disrespectful or argumentative in front of this child, against each other for any reason."

21. While it was not proven that Mother "chanted" at Father, she must not do it. Likewise Father must not call Mother "vile or ugly names."